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DAVID L. FREDRICK; and  
ASSOCIATION OF AMERICAN  
INTERNATIONAL MEDICAL  
GRADUATES, INC.

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ST. MATTHEW'S UNIVERSITY  
(CAYMAN) LTD., a Cayman Islands  
company,

Plaintiff,

v.

SABA UNIVERSITY SCHOOL OF  
MEDICINE FOUNDATION, a Netherland-  
Antilles company; MEDICAL  
UNIVERSITY OF THE AMERICAS, a St.  
Kitts & Nevis company; EDUCATION  
INFORMATION CONSULTANTS, INC., a  
Massachusetts corporation; EDUCATIONAL  
INTERNATIONAL CONSULTANTS, LLC,  
a Massachusetts limited liability company;  
PATRICIA L. HOUGH, M.D., an individual,  
and d.b.a. "Saba University School of  
Medicine"; DAVID L. FREDRICK, an  
individual; PANKAJ DESAI, M.D., an  
individual; ASSOCIATION OF AMERICAN  
INTERNATIONAL MEDICAL  
GRADUATES, INC., a Nevada corporation,  
a.k.a. "aaimg@yahoo.com"; THOMAS  
MOORE, M.D. a.k.a.  
"presaaimg@hotmail.com" and  
"crocdoc2004@netzero.net," an individual;  
SARAH B. WEINSTEIN a.k.a.  
"execsecaimg@hotmail.com," an individual;  
RACHAEL E. SILVER, an individual; and  
DIEDRE MOORE, an individual,

Defendants.

Case No.: CV-S-05-0848-RCJ (LRL)

**REPLY OF DAVID L. FREDRICK TO  
PLAINTIFF'S OPPOSITION TO  
DEFENDANT DAVID L. FREDRICK'S  
MOTION TO DISMISS PLAINTIFF'S  
AMENDED COMPLAINT**

1                    **REPLY OF DAVID L. FREDRICK TO PLAINTIFF'S OPPOSITION TO**  
2                    **DEFENDANT DAVID L. FREDRICK'S MOTION TO DISMISS**  
3                    **PLAINTIFF'S AMENDED COMPLAINT**

4                    Defendant David L. Fredrick ("Fredrick") files this Memorandum in Reply to the  
5                    Consolidated Opposition to Fredrick's Motion to Dismiss Plaintiff's Amended Complaint filed  
6                    by Plaintiff St. Matthew's University ("SMU").

7                    **I. SUMMARY OF ARGUMENT.**

8                    SMU has failed to carry its burden of establishing that this Court has personal  
9                    jurisdiction or venue over Fredrick. The unsworn allegations of the Amended Complaint and the  
10                  documents relied on in its Opposition do not in any way rebut Fredrick's sworn denial that he  
11                  participated in the matters complained of in the Amended Complaint in Nevada or elsewhere.

12                  SMU's Opposition also fails to establish its right to pursue its Second and Third Claim  
13                  under the Lanham Act. As a foreign entity, SMU may only pursue a claim under the Lanham  
14                  Act if it has such rights under a convention or treaty relating to unfair competition. Section 44 of  
15                  the Lanham Act codifies Congress' determination that there is no reason for the United States to  
16                  afford a citizen of a foreign country such rights if citizens of the United States are not accorded  
17                  such rights by a treaty with that foreign country. SMU's Amended Complaint fails to allege and  
18                  SMU has failed to put forward any such treaty, and for these reasons its Second and Third  
19                  Claims must be dismissed.

20                  SMU's Fifth Claim fails to state a claim for relief under the Nevada Deceptive Trade  
21                  Practice Act because the Amended Complaint fails to allege any deceptive acts causing damage  
22                  in Nevada or to its residents and may not be constitutionally construed to reach conduct and  
23                  damages occurring outside of Nevada.  
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1 Similarly, SMU's Sixth Claim must be dismissed because it fails to allege that SMU has  
 2 standing under the California Computer Crimes Act or that it has suffered any loss in California  
 3 or elsewhere as a result of any conduct prohibited by that statute.

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 5 **II. SMU HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT**  
 6 **THIS COURT HAS PERSONAL JURISDICTION OVER FREDRICK.**

7 SMU claims that Fredrick's sworn denial of the unsworn allegations of the Amended  
 8 Complaint have no evidentiary weight and that therefore Fredrick must be assumed to have  
 9 known "of the tortious acts of his alleged co-conspirators and the effects of such acts in the State  
 10 of Nevada." (Consolidated Opposition To Defendant David L. Fredrick's Motion to Dismiss  
 11 ("SMU Opp.") at p. 3.) In making this contention, SMU relies solely upon its unverified  
 12 Amended Complaint and ignores that those allegations are the allegations denied by Fredrick  
 13 under oath and that it is SMU's unsworn complaint which is of no evidentiary value in opposing  
 14 Fredrick's motion to dismiss. Where a defendant moves to dismiss a complaint for lack of  
 15 personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is  
 16 appropriate. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9<sup>th</sup> Cir. 2004); Sher  
 17 v. Johnson, 911 F.2d 1357, 1361 (9<sup>th</sup> Cir.1990). The plaintiff cannot "simply rest on the bare  
 18 allegations of its complaint." Schwarzenegger, 374 F.3d at 800; Amba Marketing Systems, Inc.  
 19 v. Jobar International, Inc., 551 F.2d 784, 787 (9<sup>th</sup> Cir.1977). Yet, that is all that SMU has done  
 20 in this case.

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 22 Contrary to SMU's contention that its Amended Complaint must be accepted as true, only  
 23 uncontroverted allegations in the complaint may be taken as true. Schwarzenegger, 374 F.3d at  
 24 800; American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9<sup>th</sup>  
 25 Cir.1996). Since Fredrick has, by affidavit, denied the unsworn allegations of SMU's Amended  
 26 Complaint, SMU must submit sworn evidence to meet its burden of establishing personal  
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jurisdiction. Tomlinson v. H&R Block, Inc., 151 Fed. Appx. 655, 657 (10<sup>th</sup> Cir. 2005) (“The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant’s affidavits.”) See also Williams v. Bowman Livestock Equipment. Co., 927 F.2d 1128, 1130-31 (10<sup>th</sup> Cir. 1991).

SMU has failed to meet its burden. SMU’s Opposition is wholly unsupported by any sworn evidence that Fredrick participated in or had knowledge of any activities alleged in the Amended Complaint or that he acted in furtherance of those activities in Nevada or elsewhere. To the extent SMU has offered certain certified documents, they do not prove anything with respect to Frederick. While SMU contends that Exhibit C to its Opposition establishes that Frederick owns an email account known as saba@tiac.net, Exhibit C does not support this contention. It establishes simply that the “Account Company” is SABA University and that communications with SABA University should be sent to the “Attn: David Fredrick.” It is not at all surprising that the President of SABA University would be the person to whom account information is directed, and this hardly establishes that Fredrick is responsible for any or all e-mails allegedly sent from SABA University’s e-mail account.

As SMU admits, the only evidence it has brought to the Court’s attention concerning any telephone number used to access the account is that the account was accessed by a telephone number in the name of Patricia Hough, a separately named defendant - not one in the name David Fredrick. (SMU Opp. at 9.) There is absolutely no evidence that Fredrick participated in that call or even that that call had anything to do with the allegations of SMU’s Complaint against not only Fredrick but also those against Hough. Although SMU blithely claims that this is one of “hundreds of documented instances” linking Fredrick to the allegations of the Amended Complaint (SMU Opp. at 9), it has only provided the Court with this one alleged “instance” and

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1 this "instance" – a phone call made from a phone line in another person's name and not shown to  
2 have been made by Fredrick - does not link Fredrick to anything.

3 Similarly, Fredrick has denied under oath that he conspired with Hough or anyone else in  
4 connection with the alleged conspiratorial activities in Nevada or elsewhere. (Aff. of David L.  
5 Fredrick, ¶¶3-6.) There is absolutely no evidence that Fredrick had any involvement with the  
6 formation or activities of AAIMG - the only contact this case has with Nevada - and Fredrick has  
7 denied under oath any involvement with AAIMG. (*Id.* at ¶4.) There is also absolutely no  
8 evidence that Frederick conspired with anyone in connection with the actions of AAIMG or any  
9 other defendant and he has denied any such involvement under oath. (*Id.* at ¶¶4 and 5.) SMU's  
10 unsupported assertion that its unsworn Amended Complaint should be given greater weight than  
11 Fredrick's sworn denials makes no sense as a matter of fairness or law. *See Schwarzenegger*,  
12 374 F.3d at 800; *AT & T*, 94 F.3d at 588. Indeed, SMU's total inability to present any evidence  
13 linking Fredrick with Nevada or the alleged conspiracy raises serious questions under Rule 11 of  
14 the Federal Rules of Civil Procedure.

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17 **III. PLAINTIFF'S CLAIMS MUST BE DISMISSED PURSUANT TO**  
18 **FED.R.CIV.P. 12(B)(3) BECAUSE VENUE DOES NOT LIE IN THE**  
19 **DISTRICT OF NEVADA.**

20 SMU claims that venue is appropriate because Nevada claimed to be "a judicial district in which  
21 a substantial part of the events or omissions giving rise to the claim occurred" and that Nevada is  
22 claimed to be the only district in the United States where venue would be appropriate at the time  
23 this action was filed. (SMU Opp. at 11.) SMU's position is inaccurate in both respects. The  
24 Amended Complaint alleges one act that occurred in the State of Nevada - the formation of  
25 AAIMG. The Amended Complaint does not claim that any of the statements on the AAIMG  
26 website or made in the AAIMG emails which are claimed to have caused SMU injury have  
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1 anything to do with Nevada. Rather, it alleges that the offending website was housed in Russia  
2 (Amended Complaint, ¶6) and that the offending emails emanated from servers housed in  
3 California. (Amended Complaint, p.15 n.7.) Thus, the Amended Complaint, on its face, makes  
4 it abundantly clear that Nevada is not “a judicial district in which a substantial part of the events  
5 or omissions giving rise to the claim occurred.” 28 U.S.C. 1391(b)(2).  
6  
7 In Myers v. Bennett Law Offices, 238 F.3d 1068 (9<sup>th</sup> Cir. 2001), the Ninth Circuit recognized  
8 that in construing 28 U.S.C. 1391(b)(2), the “substantiality of the operative events is determined  
9 by assessment of the ramifications for efficient conduct of the suit,” Myers v. Bennett Law  
10 Offices, 238 F.3d at 1075 (quoting Lamont v. Haig, 590 F. 2d 1124, 1134-35 (D.C. Cir. 1978)),  
11 and that in a tort action it is relevant to look to the place at which the harms were allegedly  
12 suffered by the Plaintiff in determining where a substantial part of the events giving rise to the  
13 claim occurred. Id. at 1076. Based upon SMU’s theory of the case, the only place in the United  
14 States where SMU would have suffered damages from this tortious conduct would be in  
15 connection with its student programs in Maine. (See Exhibit A, attached to Affidavit of Vincent  
16 F. O’Rourke, Jr.) Moreover, it would be far more judicially efficient to venue this action in  
17 either Maine, where SMU theoretically has suffered its damages, or Massachusetts, where SMU  
18 now claims many operative activities occurred. Both of these jurisdictions would be far more  
19 efficient from the point of view of witnesses and documentary evidence than Nevada, which has  
20 little or no contact with the action, the witnesses or the damages alleged. See Core-Vent Corp. v.  
21 Nobel Industries AB, 11 F.3d 1482, 1486 (9<sup>th</sup> Cir. 1993)(No personal jurisdiction in California  
22 over enterprise with worldwide market and no activities directed at California or its residents.)  
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IV. THIS COURT MUST DISMISS COUNTS II AND III OF PLAINTIFF'S AMENDED COMPLAINT BECAUSE PLAINTIFF, AS A FOREIGN NATIONAL, COULD ONLY BRING A LANHAM ACT CLAIM UNDER 15 U.S.C. § 1126, WHICH IT ADMITTEDLY HAS NOT DONE.

SMU is a foreign national, incorporated in the Cayman Islands. (Amended Complaint, ¶ 3a.) Contrary to SMU's contention, SMU may only proceed under Section 1126 (b) and (h) of the Lanham Act<sup>1</sup>, pursuant to which Congress provided a cause of action for foreign nationals. Sections 1126 (b) and (h) extend the protections and remedies of the Lanham Act for unfair competition only to a foreign national whose "country of origin is a party to any convention or treaty relating to ... unfair competition, to which the United States is also a party, or extends reciprocal rights to nationals of the United States by law." 15 U.S.C. § 1126 (b); In Larsen v. Terk Technologies Corp., 151 F.3d 140, 145-46 (4<sup>th</sup> Cir. 1998), the United States Court of Appeals for the Fourth Circuit ruled that Section 44 of the Lanham Act, 15 U.S.C. § 1126:

extends the protections and remedies of the Lanham Act to any foreign national whose 'country of origin is a party to any convention or treaty relating to trademarks, trade or commercial names, or the repression of unfair competition, to which the United States is also a party, or extends reciprocal rights to nationals of the United States by law.'" 15 U.S.C. § 1126(b), (g), (h). Larsen is entitled to the protections and remedies of the Lanham Act because Denmark and the United States are both parties to the International Convention for the Protection of Industrial Property of 1883 (the Paris Convention), *opened for signature* Mar. 20, 1883, 25 Stat. 1372, T.S. No. 379, as amended at Stockholm, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923. See 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 29:21, at 29-46, 29-49 (4th ed.1998).

See also Scotch Whiskey Ass'n v. Majestic Distilling Co., 958 F.2d 594, 597 (4<sup>th</sup> Cir.

1992)(Section 1126(b) of the Lanham Act gives those persons whose country of origin is a party

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<sup>1</sup> 15 U.S.C. § 1126, also referenced as Section 44 of the Lanham Act, provides that "[a]ny person whose country of origin is a party to the convention ... shall be entitled to benefits [under § 1126] to the extent necessary to give effect to any provision of such convention ..." 15 U.S.C. § 1126(b). 15 U.S.C. § 1126(h) provides that any person covered by § 1126(b) "shall be entitled to effective protection against unfair competition, and the remedies ... shall be available so far as they may be appropriate in repressing acts of unfair competition."

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1 to a treaty relating to unfair competition those benefits of Section 1126 necessary to give effect  
2 to the Treaty).

3 15 U.S.C. § 1126(h) is intended to provide Lanham Act protection only to a foreign  
4 national whose country of origin is party to any convention or treaty relating to the repression of  
5 unfair competition and who meets the other requirements set forth in section 1126(b). Larsen,  
6 151 F.3d at 145-46; Pagliero v. Wallace China Co., 198 F.2d 339 (9<sup>th</sup> Cir. 1952); Stauffer v.  
7 Exley, 184 F.2d 962 (9<sup>th</sup> Cir. 1950). After analyzing the legislative history of Section 1126, the  
8 United States Court of Appeals for the Third Circuit concluded that the statute clearly limited  
9 the circumstances under which a foreign national could bring a Lanham Act claim: "[T]here  
10 [would be] no need for such a limited declaration of jurisdiction over unfair competition [claims  
11 by foreign nationals] if the Lanham Act had covered ... countless other [situations] in a much  
12 broader grant of jurisdiction over all unfair competition in commerce." L'Aiglon Apparel v.  
13 Lana Lobel, Inc., 214 F.2d 649, 654 (3<sup>rd</sup> Cir. 1954).<sup>2</sup>

14 Although SMU is a foreign national, SMU acknowledges that it has not alleged a cause  
15 of action under 15 U.S.C. §§ 1126(b) and (h). "Importantly, nowhere has the Plaintiff alleged  
16 any cause of action under 15 U.S.C. § 1126 as Defendants state and argue in their Motions."  
17 (SMU's Opp. at 16.) Under the law, SMU's only potential cause of action under the Lanham  
18 Act is under Section 1126.

19 Having admitted it did not file an action under 15 U.S.C. § 1126, SMU attempts to avoid  
20 dismissal by arguing that a foreign national can bring a Lanham Act claim under Section 1125  
21 because, by its terms, "any person" can bring an action under that statute. (SMU Opp. at 13.)  
22 This argument, however, ignores the definition of "person" set forth in 15 U.S.C. § 1127, which  
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<sup>2</sup> The legislative history of the Lanham Act is set out in detail in L'Aiglon Apparel v. Lana Lobel, Inc., 214 F.2d 649, 654 (3<sup>rd</sup> Cir. 1954).



1 does not include foreign nationals:

2 The: term "person" and any other word or term used to designate the applicant or  
3 other entitled to a benefit or privilege or rendered liable under the provisions of  
4 this Act includes a juristic person as well as a natural person. The term "juristic  
5 person" includes a firm, corporation, union, association, or other organization  
6 capable of suing or being sued in a court of law. (Emphasis added.)

7 The definition of person makes clear that it includes only those "entitled to a benefit or privilege"  
8 under the Act. This definition, therefore, must be read in conjunction with Section 1126 which  
9 specifically provides the extent to which a foreign national can bring an action under the Lanham  
10 Act. As a matter of statutory construction, a foreign national is not a "person" for purposes of  
11 Section 1125, as defined in Section 1127, because a foreign national, such as SMU, can bring an  
12 action for unfair competition only in accord with the provisions of Section 1126(b) and (h).<sup>3</sup>

13 Finally, SMU inaccurately contends that courts have uniformly held that foreign nationals  
14 can bring actions under Section 1125. (SMU Opp. at 14.) The cases relied upon by SMU do not  
15 support its position.

16 SMU first cites the case of Noone v. Banner Talent Associates, Inc., 398 F.Supp. 260  
17 (S.D.N.Y. 1975), in which the court did not ultimately decide this issue. In response to plaintiff's  
18 argument that he could bring an action under Section 43(a)[15 U.S.C. § 1125(a)], the defendant  
19 argued that the action had to be brought, if at all, under Section 44(b)[15 U.S.C. § 1126(b)]. The  
20 District Court avoided ruling on the issue, reasoning: "that although plaintiff frames his claim for  
21 relief pursuant to Section 43(a), I would find that the facts would clearly support a claim for relief  
22 pursuant to Section 44(b)." 398 F. Supp. at 262 (Emphasis added.)  
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25 <sup>3</sup> SMU also argues that pursuant to 15 U.S.C. §1121(a) the district courts have original jurisdiction  
26 over causes of action under the Lanham Act regardless of the citizenship of the parties, and, therefore, this  
27 establishes that a foreign national can bring an action. This argument lacks merit because this statute  
28 merely establishes that a claim under the Lanham Act can be brought in federal district court, if properly  
pled, based on federal question jurisdiction, regardless of diversity of citizenship. This statute does not  
expand the substantive scope of the causes of action under the Lanham Act and does not provide SMU with  
a cause of action.

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SMU next cites the case of L'Aiglon Apparel, *supra*, 214 F.2d 649, which in fact supports the Defendants' argument. The L'Aiglon Court addressed in detail the legislative history of Section 1126 and correctly concluded that Section 1126 expressly limits the claims that can be made by a foreign national. 214 F.2d at 654. Indeed, as the Court stated, Section 1126 would not exist if Congress intended to give foreign nationals a plenary right to sue under the Lanham Act. *Id.* L'Aiglon did not and could not hold that a foreign national can sue under Section 1125, as in that case both the Plaintiff and Defendant were both citizens of the United States. *Id.*

SMU then cites Scotch Whiskey Ass'n v. Barton Distilling Co., 338 F.Supp. 595 (N.D. Ill. 1971), which also does not support SMU. Though ruling that the Plaintiff therein could bring an action under Section 1125(a), the Court did so without any analysis and appears to have avoided ruling on the effect of Section 1126 because it also found that Plaintiff stated a claim under that statute and asserted jurisdiction under Section 1126. The Court held, among other things:

4. This court has jurisdiction of plaintiffs' claim under the Convention of Paris for the Protection of Industrial Property, as implemented by 15 U.S.C. 1126(b), since plaintiffs' claim arises under the Trademark Laws, with jurisdiction being conferred by NK"<http://www.westlaw.com/Find/Default.wl?rs=FIPI1.0&vr=2.0&DB=1000546&DocName=15USCAS1121&FindType=L>"15 U.S.C. 1121 and 28 U.S.C. 1338(a).

5. The court has jurisdiction of plaintiffs' claim under the Convention of Paris for the Protection of Industrial Property, since plaintiffs' claim arises under a treaty of the United States and the value of the matter in controversy is in excess of \$10,000, exclusive of interest and costs, with jurisdiction being conferred by 28 U.S.C. 1331.

The Scotch Whiskey Court failed to address, much less resolve, the issue of whether SMU is limited to an action under Section 1126, or whether, as claimed by SMU, it can bring an action under Section 1125.

SMU's reliance on Spartan Chemical Co. v. ATM Enterprises of America, (Exhibit F to SMU Opp.), is also misplaced. While that Court stated that a foreign national could bring an action



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under Section 1125, the Court's sole reliance for that proposition was Noone, supra. As discussed above, the Noone Court avoided addressing the issue presented here because the Court found that Noone had stated a claim under Section 1126(b). Moreover, there is no indication that the defendant in Spartan Chemical raised the issue of the limitations on foreign nationals established by Section 1126(b) and the Spartan Chemical Court did not address that issue.

None of the remaining cases cited by SMU ever mentioned, let alone addressed, Section 1126, and the limitations imposed by that statute on actions brought by foreign nationals. Johnson & Johnson v. Carter-Wallace Inc., 631 F.2d 186 (2d Cir. 1980); West Indian Sea Island Cotton Ass'n Inc. v. Threadtex, Inc., 761 F.Supp. 1041 (S.D.N.Y. 1991); Menendez v. Faber, Coe, & Gregg Inc., 345 F.Supp. 527 (S.D.N.Y. 1972).

V. **SMU'S FIFTH CLAIM FAILS TO STATE A CLAIM FOR RELIEF BECAUSE IT FAILS TO ALLEGE ANY CONDUCT IN NEVADA CAUSING DAMAGE TO SMU IN NEVADA OR ANY DAMAGE TO SMU OCCURRING IN NEVADA.**

SMU's Amended Complaint alleges that Defendants violated the Nevada Deceptive Trade Practice Act, NRS 598.0915 (3) (5) (7) (15). Even assuming, as SMU contends, that it is appropriate to bring that claim under those provisions rather than under NRS 41.600,<sup>4</sup> SMU's claim must be dismissed because SMU's Amended Complaint fails to allege that any conduct that caused damage to SMU occurred within the State of Nevada or that any resident of the State of Nevada was injured by the conduct alleged in the Amended Complaint. The Amended Complaint simply alleges that Defendant AAIMG was incorporated in the State of Nevada. All other conduct alleged occurred outside of Nevada, including that the AAIMG website is hosted in Russia and that it is serviced from servers in California. No damage is alleged to have

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<sup>4</sup> But see Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada, 102 P.3d 578, 583 n.7 ("NRS Chapter 598 generally provides for a public cause of action for deceptive trade practices. NRS 41.600 ... provides for a private cause of action.")



1 occurred in Nevada. If SMU suffered any damage at all it did so at its operations in Maine and  
2 in the Cayman Islands.

3 The State of Nevada is not a national ombudsman. It may enact laws that regulate conduct that  
4 impacts its residents, but “cannot impose punitive sanctions for conduct that affected other states  
5 but had no impact on the ... state or its residents.” White v. Ford Motor Co., 312 F.3d 998, 1016  
6 at n.68 and 1018-1020 (9<sup>th</sup> Cir. 2003).

7  
8 SMU mistakenly argues that the principles of White v. Ford Motor Co., *supra*, apply only  
9 to a state’s power to impose punitive damages on extraterritorial conduct. There is simply no  
10 basis on which a state may declare unlawful and subject to damages conduct occurring in  
11 another state which has no impact on it or its citizens. To permit such legislation would interfere  
12 with the sovereign right of one state to control conduct and economic activities within its  
13 borders. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 570 -572 (1996). It is  
14 axiomatic that “[n]o State can legislate except with reference to its own jurisdiction....Each  
15 State....is independent of all others in this particular.” *Id.* at 571 (quoting Bonaparte v. Appeal  
16 Tax Court of Baltimore, 104 U.S. 592, 594 (1881)). Based on this long-established principle, the  
17 BMW Court “imposed a territorial limitation on punitive damages in the interest of federalism.  
18 This federalism includes the flexibility for a state to have whatever policy it chooses within  
19 constitutional and congressional limits. For that flexibility to exist, no state can be permitted to  
20 impose its policies on other states.” White v. Ford Motor Co., 312 F.3d at 1014.

21  
22 Although BMW and White addressed punitive damages, the rationale of each of those  
23 decisions makes it clear that it would be unconstitutional for Nevada to enact a statute which  
24 prohibits conduct which does not occur within its borders and causes no damage within its  
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1 borders. For the foregoing reasons the Nevada Deceptive Trade Practice Act should not be  
 2 construed to apply to this action and SMU's Fifth Claim should be dismissed in its entirety.

3  
 4 **VI. SMU'S SIXTH CLAIM MUST ALSO BE DISMISSED FOR**  
 5 **FAILURE TO ALLEGE A CLAIM FOR RELIEF UNDER THE**  
 6 **CALIFORNIA COMPUTER CRIMES ACT.**

7 SMU maintains that it has properly pled a cause of action under the California Computer  
 8 Crimes Act ("CCCA") which provides a "civil remedy [for] the owner or lessee of the computer,  
 9 computer system, computer network, computer program or data who suffers damage or loss by  
 10 reason of a violation of any of the provisions of subdivision (c)" of Section 502 of the CCCA.<sup>5</sup>  
 11 However, SMU's Amended Complaint fails to establish that it has standing under this provision  
 12 because it fails to allege that it is an "owner or lessee of [a] computer, computer system,  
 13 computer network, computer program or data who suffers damage or loss by reason of a  
 14 violation of any of the provisions of subdivision (c)" of Section 502 of the CCCA. Rather, the  
 15 complaint alleges that Defendants accessed computers owned by Yahoo and Hotmail, entities not  
 16 alleged to be affiliated with or represented by SMU. (Amended Complaint, p.15 n.7.)

17  
 18 The Amended Complaint also does not allege that "a loss was suffered by reason of a  
 19 violation of subdivision (c)" of Section 502. That section sets forth a variety of computer-related  
 20 crimes involving activities such as unauthorized access to computers or computer systems and  
 21 intentional damage or alteration of such systems. While, as SMU claims, California law may  
 22 recognize computer related causes of action other than under Section 502, those causes of action  
 23 are not alleged in SMU's Sixth Claim and it must be dismissed.  
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 27 <sup>5</sup> SMU correctly notes that counsel for Defendant cited a since amended provision of the CCCA.  
 28 Counsel did so in reliance upon a website maintained by the California Bay-Delta Authority, an agency of  
 the State of California, and apologizes to the Court for the error.

CONCLUSION

The Amended Complaint in this matter against David L. Fredrick should be dismissed pursuant to Fed.R.Civ.P. 12 (b)(2) and Fed.R.Civ.P. 12 (b)(3) because this Court lacks personal jurisdiction over Fredrick and venue is not proper with respect to the claims against him. Alternatively, the Amended Complaint fails to state claims upon which relief can be granted in its Second, Third, Fifth and Sixth Claims and those Claims must be dismissed if this Court retains jurisdiction over Fredrick.

DATED this 20 day of March, 2006.

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CERTIFICATE OF MAILING

I hereby certify that on this 20 day of March, 2006, I did deposit in the United States Post Office, with postage fully prepaid thereon, a copy of the above and foregoing **REPLY OF DAVID L. FREDRICK TO PLAINTIFF'S OPPOSITION TO DEFENDANT DAVID L. FREDRICK'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT** to:

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